IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Plaintiff-Appellant,

v.

RENNER REALTY CORP., ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of GERTRUDE C. SHERWOOD, deceased, SARAH E. MORGAN, R. M. OLLINGER, INC., HELMSLEY-SPEAR, INC. and WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants-Appellees

JURISDICTIONAL STATEMENT

JOHN G. NICHOLAS
Attorney for Appellant
37-11 Union Street
Flushing, New York 11354

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976
No.

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Plaintiff-Appellant

v.

RENNER REALTY CORP., ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of GERTRUDE C. SHERWOOD, deceased, SARAH E. MORGAN, R. M. OLLINGER, INC., HELMSLEY-SPEAR, INC. and WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.

Defendants-Appellees

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, LUCILLE WITZ, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Court of Appeals of the State

of New York in this case and should exercise such jurisdiction herein.

OPINION BELOW

The judgment of the Court of Appeals of the State of New York is included herein as Appendix A.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action for wrongful death. The judgment of the Court of Appeals of the State of New York was entered on February 17, 1976. A timely notice of appeal was filed on May 6, 1976 in the Supreme Court of the State of New York. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, subparagraph (2).

Cases that sustain the jurisdiction of this Court include:

Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L.Ed.2d. 36 (1972);

Smith v. Cahoon, 283 U.S.553, 51 S.Ct. 582, 75 L.Ed. 1264 (1931);

Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675 (1935).

The validity of Sections 3012(b) and 3216(b) of the Civil Practice Law and Rules of the State of New York are submitted for the consideration of this Court and the text thereof is included herein as Appendix B.

QUESTIONS PRESENTED

Whether the Court below properly affirmed the decision of the Appellate Division of the Supreme Court of the State of New York which reversed the

lower Court's decision and granted Defendants' motion to dismiss for failure to timely serve the complaint in this action.

Whether Sections 3012(b) and 3216(b) of the Civil Practice Law and Rules of the State of New York are so inconsistent and inherently unfair as to deny plaintiffs, similarly constituted, the equal protection of the law and the right of due process, so as to be repugnant to the 14th amendment of the Constitution of the United States.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

On February 17, 1962, Guy X. Witz died, trapped in a stalled elevator during a fire in a commercial building located in the City of New York.

This action to recover damages for his wrongful death was commenced by service of the summons on February 14, 1964. Defendants appeared by various attorneys and demands for copies of the complaint were made on March 12, 1964, April 10, 1964 and April 29, 1964.

Concededly, no complaint was served within the twenty day period following service of these demands. However, no motion was thereafter made on behalf of any of the Defendants to dismiss the action on this basis and, so far as the Record reveals, there was no further activity until February 14, 1974, when Plaintiff's attorney served a verified complaint, together with photocopies of the summonses and notices of appearance previously served.

Copies of the verified complaint were

retained by the attorneys for the various Defendants for periods of from almost three weeks to almost two and one-half months before they were returned with notices or letters rejecting the service as untimely.

Thereafter, by notice of motion dated April 6, 1974, Plaintiff moved to compel Defendants to accept service of the complaint. Plaintiff's affidavit set forth that at the time of her husband's sudden death he was thirty-five years of age and, in addition to her, he left surviving two infant children, a daughter who was then seven years of age and a son then four years of age. The decedent was self-employed with an office in the building wbere he met his death. After working until approximately 2:00 a.m. on February 17, 1962, the

decedent had entered an elevator on the fourth floor. Between the third and fourth floors, the elevator stalled because of power failure caused by a fire in the building. Trapped in the elevator, the decedent suffocated and burned to death.

On May 23, 1974, Defendants moved to dismiss the action for failure to serve a complaint.

The Supreme Court of the State of New York granted Plaintiff's motion and denied Defendants' motion requiring, however, that Plaintiff's attorney of record personally pay $100.00 costs to the attorneys for Defendants.

The Court predicated its determination at least in part, upon the failure of the Defendants to serve a forty-five day notice which, under CPLR 3216, is

a condition precedent to a motion to dismiss for neglect to prosecute.

Defendants appealed to the Appellate Division, First Department which reversed the said order on February 25, 1975 and granted Defendants motion to dismiss for failure to serve a complaint. Plaintiff appealed to the Court of Appeals of the State of New York which entered judgment on February 17, 1976 affirming the decision of the Appellate Division.

The brief of the Plaintiff submitted to the Court of Appeals conceded that CPLR 3012(b) does not carry the protection afforded by the forty-five day notice requirement of CPLR 3216. It also respectfully suggested that the omission of such protection is an undeserved and unwarranted burden to

place upon the innocent Plaintiff. The Court's attention was also directed to CPLR 205(a) which contained another defense mechanism to insure the Plaintiff his day in Court. This section provides that if an action is timely commenced and is terminated in a manner other than on the merits or under specified exceptions, the Plaintiff may commence a new action upon the same cause of action within six months after its termination even though the period of limitations would otherwise have run. This six month grace period does not apply, however, where the dismissal is for failure to prosecute. The brief further suggested to the Court that there was no inequity in this provision when the

motion to dismiss is governed by CPLR 3216 for the negligent or forgetful attorney and his client are covered by the protective umbrella of the forty-five day requirement but that the plaintiff in a matter governed by CPLR 3012(b) is afforded no such protection but is, in effect, helpless in a situation which he has not created and from which he is unable to escape.

The Court was respectfully urged not to wait for the Legislature to remedy the wrong caused by the inequities inherent in the statute, but, in the sound exercise of its discretion and the interest of justice, to compel acceptance of the complaint herein, thereby allowing the Plaintiff to litigate her cause on the merits and rescue

her from a morass of technicality corrected statutorily under CPLR 3216 but left for the Court to correct under CPLR 3012(b).

The Court was, therefore, apprised of the inequities inherent in the statute and the denial of due process to the Plaintiff herein and of the equal protection of the law to plaintiffs similarly affected by the neglect of counsel.

By its dismissal of the appeal, the Court has affirmed the constitutionnality of the applicable statutes and the jurisdiction of this Court is respectfully invoked on the grounds that a constitutional question was submitted to the Court below and it sustained the validity of the statutes.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that Section 3216(b) (3) provides that dismissal of an action for failure to prosecute cannot be granted after issue has been joined unless a demand is served requiring the plaintiff to resume prosecution and serve and file a note of issue within forty-five days after receipt of such demand while CPLR 3012(b) provides that if a complaint is not served within twenty days after service of the demand, the Court upon motion may dismiss the action. There is, therefore, a condition precedent to the granting of a motion to dismiss

when a complaint has been served which does not exist where no complaint has been served. Both situations are, admittedly, the result of neglect of counsel, often inadvertent and unintentional.

It is submitted that the Legislature in enacting CPLR 3216 was attempting to protect the innocent plaintiff from such neglect, thereby affording him an umbrella of protection in order to preserve his right of action. It is respectfully submitted that this protection extended to plaintiffs subject to the neglect or inadvertence of counsel cannot be extended to one class of such plaintiffs and denied to others similarly constituted. The plaintiff

whose attorney fails to file a note of issue receives a warning that unless he does so within forty-five days his client's cause will be lost while the attorney who fails to file and serve a complaint receives instead a notice of motion to dismiss which motion is invariably granted.

The consequences of neglect of counsel should not be suffered by those plaintiffs whose attorneys fail to file and serve one document while such consequences are avoided by plaintiffs whose attorneys fail to file and serve a different document.

The protection provided all citizens of the United States by the Federal Constitution cannot be based on the

nature of the document at issue.

This Court is respectfully urged to consider that the inequities inherent in the applicable sections of the Civil Practice Law and Rules of the State of New York deny equal protection to all plaintiffs who are victimized by the failure of counsel to file documents necessary to prosecute an action. By allowing these sections to remain unchallenged the Court will allow those rights guaranteed to all citizens of the United States to be denied to certain plaintiffs because of the content and nature of a document of practice.

A substantial constitutional question has been submitted to the Court below and is submitted to the Court

herein. Equal protection and the right of due process must be based on the nature and rights of citizenship. It cannot be denied on the basis of the text and wording of a paper. It is inconceivable that failure to file and serve one document in an action can be cause for a warning of dire consequences while failure to file and serve another document can bring those consequences without the benefit of such a warning.

The attorney alone does not suffer in such a situation, but it is rather the innocent plaintiff who has placed his trust in counsel and must bear the consequences of the actions of such counsel. The Legislature, in its

wisdom, has granted a reprieve to a plaintiff whose attorney's actions are within the purview of CPLR 3216 but has granted no such reprieve to a plaintiff whose attorney's actions are within the purview of CPLR 3012(b).

Such an inconsistency denies the right of due process to the plaintiff governed by 3012(b) and denies him the equal protection of the law which is granted all citizens of the United States by the 14th amendment of the Federal Constitution.

It is, therefore, submitted that Section 3012(b) of the Civil Practice Law and Rules of the State of New York is unconstitutional and that such allegation presents a substantial federal question for the resolution of

which the jurisdiction of this Court is respectfully invoked.

This Court in Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972) determined that certain inequities would be countenanced only when they resulted in the accomplishment of a valid State objective. Here, as in Lindsey failure to challenge those statutory provisions resulting in such inequities cannot result in the accomplishment of a valid State objective. The granting of the right of action to certain civil litigants and the denial of such right to other civil litigants similarly constituted is, it is submitted, a perversion of due process and must not be countenanced.

CONCLUSION

For the reasons stated above, Appellant submits that this appeal brings before the Court substantial and important constitutional questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.

Dated: May 12, 1976

Respectfully submitted,

JOHN G. NICHOLAS
Attorney for Appellant

APPENDIX A

1 Mo. No. 145 SSD 3

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LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Appellant,

vs.

RENNER REALTY CORP., et al.

Respondents,

and ELIZABETH S. CALLARGY, et al,

Defendants.

----------x

Appeal dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals.

DECISION COURT OF APPEALS February 17, 1976

APPENDIX B

Section 3012(b) Demand for complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action. A demand or motion under this section does not of itself constitute an appearance in the action.

Section 3216(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within forty-five days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said forty-five day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

APPENDIX C

COURT OF APPEALS
STATE OF NEW YORK
- - - - - - - - - - - - - - - - - - - x

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Plaintiff,

-against-

RENNER REALTY CORP., ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of GERTRUDE C. SHERWOOD, deceased, SARAH E. MORGAN, R. M. OLLINGER, INC., HELMSLEY-SPEAR, INC. and WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants,

- -x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that LUCILLE WITZ, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dismissing entered in this action on February 17, 1976.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated: May 6, 1976

JOHN G. NICHOLAS
Attorney for Appellant
37-11 Union Street
Flushing, New York 11354

TO: SATTERLEE & STEPHENS, ESQS.
Attorneys for Defendants
ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD and ESTATE OF GERTRUDE C. SHERWOOD and SARAH E. MORGAN
277 Park Avenue
New York, New York 10017

TO: BENJAMIN E. GELERMAN, ESQ.
Attorney for Defendants
RENNER REALTY CORP.,
R. M. OLLINGER, INC.
WATSON ELEVATOR COMPANY, a corporation and
TURNBULL ELEVATOR, INC.
345 Adams Street
Brooklyn, New York 11201

TO: MELE & CULLEN, ESQS.
Attorneys for Defendant
HELMSLEY-SPEAR, INC.
150 William Street
New York, New York 10038

PROOF OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Roy H. Rudd, Jr., an attorney in the office of John G. Nicholas, Esq., attorney of record for Lucile Witz, appellant herein, depose and say that on the 6th day of May, 1976, I served a copy of the foregoing Notice of Appeal on the several parties thereto as follows:

1. Upon Elizabeth S. Callargy, Regina S. Kearns, James K. O. Sherwood and Estate of Gertrude C. Sherwood and Sarah E. Morgan, defendants by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Satterlee & Stephens, Esqs. their attorneys of record, at 277 Park Avenue, New York, New York 10017.

2. Upon Renner Realty Corp., R. M. Ollinger, Inc., Watson Elevator Company, a corporation and Turnbull Elevator, Inc. defendants, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Benjamin E. Gelerman, Esq.,their attorney of record, at 345 Adams Street, Brooklyn, New York 11201.

3. Upon Helmsley-Spear, Inc., defendant, by mailing a copy in a duly addressed envelope, with first class postage prepaid to Mele & Cullen, Esqs., its attorney of record, at 150 William Street, New York, New York 10038.

All parties required to be served have been served.

Subscribed and sworn to before me

this 6th day of May, 1976.

EDWARD J. KEENAN
Notary Public, State of New York
No. 24-4500960
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

(Filed in Supreme Court of the State of New York, New York County on May 6, 1976)

Submitted by
ANTHONY J. McNULTY

IN THE

Supreme Court of the United States

OCTOBER 1975 TERM

No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of Guy X. Witz, deceased,

Plaintiff-Appellant,

against

RENNER REALTY CORP., R. M. OLLINGER, INC., WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants-Appellees,

and

ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of Gertrude C. Sherwood, deceased, SARAH E. MORGAN and HELMSLEY-SPEAR, INC.,

Defendants.

NOTICE OF MOTION, AFFIDAVIT, BRIEF AND APPENDIX IN SUPPORT OF MOTION BY DEFENDANTS-APPELLEES TO DISMISS APPEAL BY PLAINTIFF-APPELLANT

BENJAMIN E. GELERMAN,
Attorney for Defendants-Appellees,
345 Adams Street,
Brooklyn, New York 11201.
Tel. (212) 643-3391

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Notice of Motion to Dismiss Appeal by Plaintiff-Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1975 TERM

No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of Guy X. Witz, deceased,

Plaintiff-Appellant,

against

RENNER REALTY CORP., R. M. OLLINGER, INC., WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants-Appellees,

and

ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of Gertrude C. Sherwood, deceased, SARAH E. MORGAN and HELMSLEY-SPEAR, INC.,

Defendants.

SIRS:

PLEASE TAKE NOTICE that, upon the order of the Court of Appeals of the State of New York, dated February 17, 1976, which *sua sponte* dismissed the appeal of the Plaintiff-Appellant to that Court from an order of reversal of the Appellate Division of the Supreme Court of the State of New York, dated February 25, 1975; upon the affidavit of Anthony J. McNulty and the Brief annexed hereto and upon all of the proceedings heretofore had herein, the undersigned will move the Supreme Court of the United

Notice of Motion to Dismiss Appeal by Plaintiff-Appellant.

States, at a Session thereof for the hearing of motions of this type, pursuant to Rule 16(1)(a) of the Revised Rules of said Court, for an order dismissing the appeal of the Plaintiff-Appellant to said Court on the ground that the Court is without jurisdiction to hear the appeal under Section 1257 of Title 28, USC or, in the alternative, for an order dismissing the appeal pursuant to Rule 16(1)(b) of said Rules on the ground that the constitutional question sought to be reviewed was never raised nor passed on by the Court of Appeals of the State of New York or for such other and further relief as to the Court may seem just and equitable in the premises.

Dated: New York, New York
June 10, 1976

Yours, etc.,

BENJAMIN F. GELERMAN,
Attorney for Defendants-Respondents,
345 Adams Street
Brooklyn, New York 11201
Tel. (212) 643-3391

To:

JOHN G. NICHOLAS, Esq.,
Attorney for Plaintiff-Appellant,
37-11 Union Street
Flushing, New York 11354

Affidavit in Support of Motion.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANTHONY J. MCNULTY, being duly sworn, deposes and says:

I am an attorney at law, duly admitted to practice before the Court of Appeals of the State of New York and the Supreme Court of the United States. I am counsel to the attorney for the Defendants-Appellees on the appeal by the Plaintiff-Appellant to this Court from the order of the Court of Appeals of the State of New York, dated February 17, 1976, and am familiar with the facts of the case and all of the proceedings heretofore had herein. I am submitting this affidavit in support of the motion by the Defendants-Appellees for an order dismissing said appeal on the ground that this Court is without jurisdiction to hear the same.

The motion is made pursuant to Section 1257 of Title 28, United States Code, and Rule 16(1)(a) and (b) of the Revised Rules of the Court.

The basis of the motion is that the order sought to be reviewed by this Court is, in fact, non-reviewable because it is not a final judgment or decree of the highest court of the State in which a decision could be had, as required by Section 1257 of Title 28, United States Code, and further that the constitutional question sought by the Plaintiff to be reviewed by this Court was never raised by her in the Court of Appeals nor passed on by that Court, which dismissed her appeal thereto "upon the ground that the order appealed from involves a question of pure discretion of the

Affidavit in Support of Motion.

type not reviewable by the Court of Appeals" (Order of Ct. of Ap., Appellees' Appendix, p. 13).

Sworn to before me this
14th day of June, 1976

.....
Anthony J. McNulty

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19 7 7

IN THE

Supreme Court of the United States

OCTOBER 1975 TERM

No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of Guy X. Witz, deceased,

Plaintiff-Appellant,

against

RENNER REALTY CORP., R. M. OLLINGER, INC., WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants-Appellees,

and

ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of Gertrude C. Sherwood, deceased, SARAH E. MORGAN and HELMSLEY-SPEAR, INC.,

Defendants.

BRIEF OF DEFENDANTS-APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL OF PLAINTIFF-APPELLANT

Statement

This appeal herein purports to be taken by the Plaintiff-Administratrix, Lucille Witz, to this Court, pursuant to Section 1257 of Title 28, USC, from an order of the Court of Appeals of the State of New York, dated February 17,

1976, which *sua sponte* dismissed the Plaintiff's appeal to that Court from an order of reversal entered in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, on February 25, 1975, "upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals" (Order of Court of Appeals sought to be reviewed). Although a portion of said order of the Court of Appeals is reproduced as "Appendix A" at the end of the Jurisdictional Statement of the Plaintiff on her appeal herein, the entire order, as it was transmitted by mail to the attorney for the Defendants-Appellees by the Clerk of the Court of Appeals on February 24, 1976, is reproduced on page 13 of the Appendix to Appellees' Brief on the instant motion. Since the Plaintiff has neglected to include as part of her Jurisdictional Statement the order of the Appellate Division from which her appeal to the Court of Appeals was dismissed, that order is also reproduced on pages 14 and 15 of Appellees' Appendix herein.

As stated in the affidavit of Anthony J. McNulty, annexed hereto, the motion of the Defendants-Appellees to dismiss the appeal of the Plaintiff to this Court is based on jurisdictional grounds.

Facts

This is a wrongful death action commenced by the Plaintiff-Administratrix, Lucille Witz, by the service of a summons, without a complaint, on February 14, 1964, to recover damages for the death of her husband, the decedent, Guy X. Witz, allegedly resulting from personal injuries sustained by the decedent on February 17, 1962, when, as a subtenant of the lessee of the premises involved herein, he was trapped inside an elevator during a fire that occurred in the office building leased, managed and operated by the Defendants, Renner Realty Corp. and R. M. Ollinger, Inc. The complaint alleges that the elevator was serviced by

the Defendant, Turnbull Elevator, Inc., which succeeded to the interest and liabilities of the Defendant, Watson Elevator Company.

Despite repeated demands made by these Defendants in 1964, the year the action was commenced, for the service upon them of a complaint, no complaint was served by the Plaintiff on said Defendants until February 19, 1974, which was ten years after the action had been commenced and after the two-year wrongful death statute of limitations had run, whereupon it was rejected by the Defendants as untimely served.

The Plaintiff then moved at Special Term, Part I of the Supreme Court of the State of New York for an order directing the Defendants to accept service of the complaint and the Defendants cross-moved for a dismissal, pursuant to Section 3012(b) of the New York CPLR, on the ground that the complaint had not been served within twenty days of their demands therefor.

By orders made on June 26, 1974, and entered in the office of the Clerk of New York County on July 2, 1974, the Special Term denied the Defendants' cross-motion to dismiss and granted the Plaintiff's motion to compel them to accept service of the complaint, on the ground that Rule 3216 of the New York CPLR applied, which requires the Defendants to serve a 45-day notice as a condition precedent to the granting of any motion to dismiss for failure to prosecute and on the further ground that, since the statute of limitations had run against the action, "Dismissal of the action would result in the loss of whatever cause of action plaintiff may have against these defendants." In making these orders, however, the Special Term provided that $100.00 costs be awarded to each attorney for the Defendants who appeared in opposition to the motion, "to be paid by plaintiff's attorney personally, in view of his perfidious, unexplained, gross neglect now brazenly compounded by his effrontery in attempting to fasten responsibility for

lack of prosecution on defendants' failure to move sooner to dismiss" (Order of Quinn, J., N.Y. Co. Sp. Ct., June 26, 1974).

The Defendants-Appellees, as Appellants, thereafter appealed to the Appellate Division of the Supreme Court, First Judicial Department, from said orders of the Special Term and by an order dated February 25, 1975, the Appellate Division reversed said orders, denied the Plaintiff's motion and granted the Defendants' cross-motion to dismiss, severing the Plaintiff's action as to them on the ground that the Special Term erred when it applied the 45-day notice rule of Rule 3216 of the New York CPLR, because "this provision" requiring the service of a 45-day notice, "does not apply until issue has been joined, subdivision b(1)," and that "No valid excuses are offered to explain the delay in serving the complaint over this extended period." (Opinion of App. Div., on which Order of Reversal of Feb. 25, 1975, was entered).

The Plaintiff thereafter appealed to the Court of Appeals of the State of New York from the order of reversal of the Appellate Division but the Court of Appeals, after briefs had been filed on said appeal, dismissed the appeal *sua sponte* by an order dated February 17, 1976, "upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals" (Appendix to Appellees' Brief, p. 13).

The Plaintiff now seeks to appeal to this Court from the order of dismissal of her appeal by the Court of Appeals, pursuant to Section 1257 (2) of Title 28, United States Code.

FIRST POINT

The Order appealed from is not reviewable by this Court.

In her notice of Appeal the Plaintiff Administratrix appeals to this Court from an order of the Court of Appeals of the State of New York, "pursuant to Title 28, United States Code, Section 1257, subparagraph 2" (Appendix C to Ptf's Jurisdictional Statement), which reads:

> § 1257. *State courts; appeal; certiorari*
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Although the Plaintiff states on pages 3 and 4 of her Jurisdictional Statement that this Court "has jurisdiction to review the judgment entered by the Court of Appeals of the State of New York in this case", as the Court will see when it examines the order sought to be reviewed herein, it is not even a judgment, much less a final judgment "rendered by the highest court" of New York State "in which a decision could be had", as required by Section 1257 of Title 28 of the United States Code. On the contrary, said order is one entered *sua sponte* by the Court of Appeals dismissing the Plaintiff's appeal to that Court from the order of reversal of the Appellate Division of the Supreme Court of the State of New York, First Department, "upon the ground that the order appealed from

involves a question of pure discretion of the type not reviewable by the Court of Appeals" (Appendix to Appellees' Br., p. 13).

It has always been the rule in New York, as it is in this Court on the denial of applications for a writ of certiorari, that an order of the Court of Appeals dismissing an appeal or denying a motion for leave to appeal is not a final judgment on the merits and should not be so viewed (*Matter of Merchant* v. *Mead-Morrison M. Co.,* 252 N.Y. 284, 297-298; See also: *United States* v. *Carver,* 260 U.S. 482, 490; *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 917-919). This being so, it is submitted that the order of dismissal of the Court of Appeals is clearly not reviewable by this Court under Section 1257 of Title 28, United States Code, and the motion of the Defendants-Appellees to dismiss the Plaintiff's appeal from said order, pursuant to Rule 16(1)(a) of the Rules of this Court, should be granted on that ground.

SECOND POINT

The constitutional question raised by the Plaintiff on her appeal to this Court was never raised or passed on in this action by the Court of Appeals of the State of New York.

In the event this Court grants the Defendants-Appellees' motion to dismiss the Plaintiff's appeal to this Court on the ground stated in the First Point of this Brief, this Point will, of course, become purely moot.

Rule 16(1)(b) of the Revised Rules of this Court provides:

> "(b) The court will receive a motion to dismiss an appeal from a state court on the ground that . . . the federal question sought to be reviewed was not timely or properly raised, or expressly passed on."

On page 2 of her brief filed in the Court of Appeals before that Court *sua sponte* dismissed her appeal, the Plaintiff alleged that her appeal to that Court presented two questions, to wit:

> "1. Would the denial of Defendants-Respondents' motion to dismiss constitute an abuse of discretion by the Court?
>
> 2. Should Plaintiff-Appellant's motion to compel acceptance of the complaint be granted under all of the circumstances of this case?"

The Court of Appeals declined to review either of these questions because they involved a matter of discretion which it is beyond the power of that Court to review (*In re Cuzdey,* 37 N.Y. 2d 939, 940; *Murray* v. *City of New York,* 30 N.Y. 2d 113, 119).

It is submitted that it is difficult to understand how the Plaintiff on her appeal to this Court can now claim that it has jurisdiction to review a constitutional question, which was never passed on by the Court of Appeals and could not have been passed on by that Court because the Court itself, on its own motion, dismissed the appeal as being beyond its scope of review.

Furthermore, not once in the Plaintiff's brief filed in the Court of Appeals, prior to the dismissal of her appeal by that Court, nor in any of the briefs filed in the Appellate Division on the Defendants' appeal to that Court from the orders of the Special Term, was the issue of a violation of the 14th Amendment to the Constitution of the United States ever mentioned, so this issue could hardly have been passed on by the Court of Appeals, even if said Court had elected to hear the appeal, which it did not.

It will thus be seen that, from whatever angle the present appeal by the Plaintiff to this Court is viewed, it is clear beyond doubt that she has no right whatever to

take such an appeal. It is also respectfully submitted that her attempt to do so, which has prompted the necessity for making this motion, constitutes an inexcusable affront to the dignity of this Court and evinces a total lack of consideration by her or her attorney for the excess demands which are continually being placed on the Court.

CONCLUSION

The appeal by the Plaintiff to this Court should be dismissed, with costs.

Dated: New York, New York, June 10, 1976.

Respectfully submitted,

BENJAMIN E. GELERMAN,
Attorney for Defendants-Appellees

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APPENDIX TO DEFENDANTS-APPELLEES' BRIEF

Order of Court of Appeals.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of February A. D. 1976

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

1 Mo. No. 145 SSD 3

Lucille Witz, Administratrix of the Estate of Guy X. Witz, deceased,

Appellant,

vs.

Renner Realty Corp., et al.,

Respondents,

and Elizabeth S. Callargy, et al.,

Defendants.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Order of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 25, 1975.

Present: Hon. Harold A. Stevens,
Justice Presiding,
Theodore R. Kupferman,
Francis T. Murphy, Jr.,
Myles J. Lane,
J. Robert Lynch,
Justices.

1903-04N

Lucille Witz, Administratrix of the Estate of Guy X. Witz, deceased,

Plaintiff-Respondent,

—against—

Renner Realty Corp., R. M. Ollinger, Inc., Watson Elevator Company, a corporation, Turnbull Elevator, Inc.,

Defendants-Appellants,

—and—

Elizabeth S. Callargy, et al.,

Defendants.

An appeal having been taken to this Court by the defendants-appellants from two orders of the Supreme Court, New York County (Quinn, J.), entered on July 2, 1974, granting plaintiff's motion to compel defendants

to accept the complaint and denying defendants-appellants' motion to dismiss the action for failure to serve a complaint, and said appeal having been argued by Ms. Marilyn Scherer, of counsel for the appellants, and by Mr. Donald J. Werner, of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same are reversed, on the law and in the exercise of discretion, without costs and without disbursements, plaintiff's motion denied, and defendants-appellants' motion to dismiss the action for failure to serve a complaint granted, and the action dismissed and severed as to defendants-appellants. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing and severing the action as to them.

Enter:

Clerk.